Supreme Court, U.S.
FILED

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No. 02-

IN THE

Supreme Court of the United States

MARK WEAVER,

Petitioner,

v.

CHARLIE JONES,
Warden of Holman Prison,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner's constitutional right to effective counsel was violated by appellate counsel's joint representation of petitioner and petitioner's co-defendant on appeal, despite the existence of an actual conflict of interest between petitioner and his co-defendant that caused appellate counsel to forego raising petitioner's most compelling claim on appeal that petitioner's conviction for first degree burglary and sentence of life in prison without the possibility of parole were not supported by constitutionally sufficient evidence.

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Petitioner Mark Weaver respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS AND ORDERS BELOW

The Order entered by the United States Court of Appeals for the Eleventh Circuit denying a certificate of appealability on December 18, 2002, is attached as Appendix A. The Orders entered by the United States District Court for the Southern District of Alabama denying petition for writ of habeas corpus on September 12, 2002, and denying a certificate of appealability on October 16, 2002, are attached as Appendices C and B. The Report and Recommendation of the Magistrate Judge for the District Court for the Southern District of Alabama, dated August 20, 2002, is attached as Appendix D.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its judgment on December 18, 2002, and denied petitioner's motion for rehearing on February 5, 2003 (Appendix E). Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

This case also involves application of 28 U.S.C. § 2241, which provides in pertinent part: "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." This case may also invoke 28 U.S.C. § 2253, which provides in pertinent part that a "certificate of appealability may issue . . . if applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

Petitioner Mark Weaver was convicted of the alleged burglary of a trailer. In reality, petitioner was little more than a bystander to what the investigating police officer calls a drug deal gone wrong. During this incident, petitioner and his brothers were shot, one brother fatally, by the State's star witness, who before petitioner's trial had been arrested for murder. Petitioner is now paying for being in the wrong place at the wrong time by serving a life sentence without the possibility of parole.

Petitioner was represented at trial and appeal by constitutionally ineffective counsel. His trial attorney failed to conduct pretrial investigation or to locate witnesses. These witnesses would have testified that the alleged victims were drug dealers who knew petitioner by name and who had brought him into their trailer on numerous occasions. On appeal, the same attorney failed to point out the fatal flaws in the State's evidence. Under Alabama law, conviction for first degree burglary requires that the defendant armed with a weapon have the intent to commit a felony. But the State failed to produce such a weapon and offered ***absolutely no evidence*** relevant to petitioner's intent. Under any interpretation of the law, this is *not* a burglary.

Despite this dearth of evidence against petitioner, counsel failed to challenge its sufficiency on appeal. On appeal, petitioner's trial attorney, Robert Clark, represented both petitioner and his brother and co-defendant, Zonnie Weaver, in spite of a conflict of interest between the two. Indeed, at trial, this conflict manifested itself when petitioner was forced to refuse *a joint three-year plea bargain* because his brother would not accept it. As a result of these conflicting interests, attorney Clark refused to raise any arguments before the appellate courts about the sufficiency of the evidence against petitioner. Had petitioner's appellate counsel pursued such a claim, petitioner would have been exonerated.

STATEMENT OF FACTS

On February 17, 1996, petitioner's brother Zonnie Weaver drove him and their brother Ammon to Citronelle, Alabama, so that Ammon could purchase crack from Cedric (also known as Sedrick) James ("James") and Fred Kelly ("Kelly"). TT at 97.[1] Both Ammon and petitioner had purchased crack from James and Kelly on prior occasions; and all knew each other by name. HT at 9; Aff. 3 at 1. Ammon owed James and Kelly money for prior drug purchases. Aff. 3 at 1.

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1. The following abbreviations will be used: Trial transcript ("TT"); Rule 32 hearing transcript ("HT"); Affidavits 1-7 ("Aff."), attached to Petitioner's Application for Certificate of Appealability, October 15, 2002; Petitioner's Medical Records ("MR"), attached as Exhibit A to the Affidavit of Marshall M. Searcy, October 11, 2002; and the Magistrate Judge's Report and Recommendation ("Rpt."), August 20, 2002.

After arriving at Road Street in Citronelle, Ammon purchased what he thought was crack from James and Kelly. TT at 103. Zonnie drove his truck a short distance, where Ammon tried the crack and realized it was fake. TT at 104. Ammon told Zonnie to circle the truck back around the trailer, where he spotted Christy Cole outside. TT at 104. Ammon followed Cole up to the trailer into which he and petitioner had been several times in the past. Aff. 1 at 2. As always, the door of the trailer was open. HT at 28; Aff. 1 at 2. Petitioner and Zonnie waited for Ammon inside Zonnie's truck. HT at 27.

After a few minutes, petitioner got out of the truck and walked towards the trailer to check on Ammon. TT at 105. As petitioner got closer, he could hear Ammon inside the trailer, telling James that he wanted something for his money. HT at 28. As petitioner listened, the argument grew more heated and a fight ensued. HT at 28. Petitioner continued towards the trailer, but as he walked up the steps toward the door, someone standing behind the doorway hit him in the face and he fell back. TT at 105. At that point, Ammon crawled from the trailer and yelled to his brothers that he had been shot. HT at 29.

When Ammon came out of the trailer, petitioner and Zonnie picked Ammon up and helped him toward Zonnie's truck. HT at 30. Kelly emerged from behind the trailer, where he had been lying in wait with a shotgun. HT at 30. He yelled at Ammon, who stumbled around to face Kelly while still being held by his brothers. HT at 30. Kelly fired his shotgun, hitting Ammon in the chest. TT at 107. Kelly's shotgun blast also struck petitioner in the buttock and Zonnie in the wrist. TT at 107.

The police arrived within moments to find petitioner and Zonnie still trying to carry Ammon to petitioner's truck. TT at 107. Ammon was declared dead at the scene. HT at 32. The Citronelle police located the shotgun that Kelly had hidden behind the trailer, but *did not recover any knife*, though the State later argued a knife was used in the alleged burglary. TT at 262. The police arrested Kelly for murder and assault, and petitioner and Zonnie for assault. HT at 21, Aff. 6 at 2. Kelly was never prosecuted; and the assault charges against petitioner and Zonnie were subsequently amended to burglary charges. Aff. 6 at 2.

Prior to trial, attorney Clark met with petitioner three times for a total of one hour. HT at 7. Petitioner testified that around 20 people witnessed the altercation at Kelly's trailer; HT at 24, but when petitioner took Clark to Road Street, Clark inexplicably did not leave the car and never attempted to locate any of those witnesses to testify on his client's behalf. HT at 14. Nor did Clark adduce any evidence that petitioner knew the alleged burglary victims from numerous prior drug purchases, or that the "burglary" victims knew petitioner by name, and in fact, petitioner had been in their home on numerous prior occasions. HT at 9; Aff. 3 at 1. Clark also failed to obtain petitioner's medical records, which confirmed that petitioner was shot from behind and not, as Kelly testified, when he and his brothers were advancing on Kelly. MR.

After a joint trial, both petitioner and Zonnie were convicted of first degree burglary in the Circuit Court for the County of Mobile, Alabama. TT at 359-60. Later, James would brag to his friends that he and his uncle had gotten away with murder. Aff. 7 at 1-2.

REASONS FOR GRANTING THE WRIT

I. HAD PETITIONER BEEN REPRESENTED BY EFFECTIVE APPELLATE COUNSEL, HIS CONVICTION WOULD HAVE BEEN OVERTURNED

The District Court determined that petitioner's claim of ineffective assistance of appellate counsel was procedurally defaulted because petitioner did not raise the conflict of interest issue in his Rule 32 petition in state court. Alternatively, in a footnote, the Court found this claim lacking on the merits. The Eleventh Circuit declined to issue a certificate of appealability, and denied rehearing. The District Court's and the Eleventh Circuit's decisions were contrary to law as established by this Court.

A. There Was Insufficient Evidence At Trial To Support Petitioner's Conviction For First Degree Burglary

A petitioner is entitled to habeas relief if, after viewing the evidence in a light most favorable to the prosecution, no rational trier of fact could have found proof of the petitioner's guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979).

Here, the State did not submit evidence sufficient to support petitioner's conviction for first degree burglary.[2] Ala. Code § 13A-7-5. To commit first degree burglary, a person must knowingly and unlawfully enter a dwelling with the intent to commit a crime, here assault in the first degree.

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2. For a more comprehensive discussion of petitioner's insufficiency of the evidence claim, see Mark Weaver's Petition for Writ of Habeas Corpus at 151.

At trial, the State adduced *no evidence* showing beyond a reasonable doubt that petitioner entered Kelly's trailer with any sort of unlawful intent. Instead, the evidence offered by the State shows that petitioner did little more than accompany his brother to buy drugs and attempt to come to his brother's aid in a subsequent altercation with the people who sold him fake crack. RT at 30, 41, 108. The State's case against petitioner was based almost exclusively on the testimony of James, a notorious drug dealer, and Kelly, the man who shot petitioner and his brothers. TT at 162. Further, petitioner's counsel failed to present evidence that the Weavers knew James and Kelly, and had been invited into the trailer on numerous prior occasions.

In addition, for a first degree burglary, the person or another participant must be armed with a deadly weapon used either in effecting the entry, while in the dwelling, or in immediate flight of the dwelling. Nevertheless, the State failed to produce *any weapon* supposedly belonging to petitioner. Furthermore, eyewitnesses inside the trailer that night did not identify petitioner as carrying a knife; and testimony offered at trial on this issue was equivocal and conflicting. TT at 196, 215, 262.

But attorney Clark did not highlight the evidence that would have undermined the State's case at trial. Clark did not attempt to locate any of the witnesses his client told him could support his account of the incident. Most egregiously, Clark did not present petitioner's medical records at trial, which would have shown that petitioner and his brothers were shot from behind, and not, as Kelly testified, when they advanced upon him.

B. Petitioner's Appellate Counsel Had An Actual Conflict of Interest That Prevented Him From Rendering Effective Assistance

To make matters worse, petitioner's counsel labored under an actual conflict of interest in representing both petitioner and his brother Zonnie on appeal. Petitioner was alleged to have been the primary instigator in the burglary, while petitioner's brother and co-defendant was essentially accused of standing by. Both brothers had arguments based upon sufficiency of the evidence, but attorney Clark obviously felt he could not make specific references to the evidence (or lack thereof) against each of his clients without violating a duty of loyalty to one of them. Instead, petitioner's appellate counsel raised only one issue on appeal: the trial court's unexceptional statement that a person who feels cheated in a drug deal is not privileged to enter the residence of another.

The constitutional right to counsel extends to a criminal defendant's first appeal of right. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1993). Counsel may be constitutionally ineffective if an actual conflict of interest adversely affects his performance. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980). A conflict of interest arises if appellate counsel "actively represented conflicting interests" and this conflict "adversely affected his [] performance." *Cuyler*, 446 U.S. at 349-50; *see also Glasser v. United States*, 315 U.S. 60, 72-75 (1942) (conviction overturned where defense counsel's "struggle to serve two masters [could not] seriously be doubted").

Here, Clark did not challenge the evidence on appeal, although it was essential to an effective appeal on petitioner's

behalf to argue that the evidence against petitioner was constitutionally insufficient to support his burglary conviction. "Where . . . appellate counsel fails to raise a claim on appeal that is so obviously valid that any competent lawyer would have raised it, no further evidence is needed to determine whether counsel was ineffective for not having done so." *Eagle v. Linahan*, 279 F.3d 926, 943 (11th Cir. 2001); *Schultz v. State*, 481 So. 2d 456, 459 (Ala. Crim. App. 1985) (citation omitted) (Counsel has an actual conflict of interest if the "introduction of probative evidence or plausible arguments that would significantly benefit one defendant, would damage the defense of another defendant who the same counsel is representing.").

There is no question that attorney Clark recognized the actual conflict of interest between petitioner and his brother before he undertook the joint representation. This conflict between the brothers manifested itself at the trial level, when the prosecutor offered a contingent, joint plea to petitioner and his brother. RT at 128. Although petitioner's brother wanted to accept the offer, petitioner did not. RT at 46-47. According to his own testimony, Clark became very angry at Zonnie Weaver's failure to accept the plea bargain, going so far as to become "very profane . . . in saying—in questioning his intelligence level to say the least." RT at 101-02.

Indeed, in a case strikingly similar to the present one, *Reynolds v. Chapman*, 253 F.3d 1337 (11th Cir. 2001) (applying the standard articulated in *Cuyler v. Sullivan*, 446 U.S. 335 (1980)), the Eleventh Circuit held that counsel's joint representation of co-defendants post-trial created an actual conflict of interest which deprived the defendants of their constitutional rights to counsel. In light of the virtually indistinguishable facts of petitioner's case, the Eleventh Circuit erred in failing to apply it own precedent here. Under

this Court's decision in *Cuyler*, and the Eleventh Circuit's recent application of this precedent, the representation of petitioner's counsel on appeal was constitutionally ineffective.

C. Petitioner's Claim of Ineffective Assistance of Appellate Counsel Based on Conflict of Interest is Not Procedurally Defaulted

The District Court concluded that petitioner did not raise "*all of the instances*" of ineffective assistance of counsel in state court before raising them in federal court. Rpt. at 28, & 15.

However, petitioner *did* raise a claim of ineffective assistance of appellate counsel in his Rule 32 petition.[3] Further, an actual conflict of interest is not an "instance" of ineffective assistance of counsel; it violates the very essence of loyal and effective legal representation. Therefore, petitioner has preserved the issue of ineffective assistance of his appellate counsel for federal review.

Even if the Court finds that the conflict of interest claim was procedurally defaulted, petitioner can escape procedural default by showing cause for the procedural default and prejudice. *Murray v. Carrier*, 477 U.S. 478 (1986). "[A] showing that the factual or legal basis for a claim was not reasonably available to counsel" can constitute cause for purposes of excusing procedural default. *Id.* at 488.

As noted above, petitioner's conviction currently rests on insufficient evidence. In fact, the State's evidence was so

3. *See* Petitioner's Rule 32 Petition at 133.

flimsy that, during trial, the State offered a *three year* plea bargain. But despite the weaknesses of the State's case, trial counsel did not adduce evidence at trial to further contradict the State's witnesses.

Moreover, petitioner can show cause because the legal basis for his claim of conflict of interest was decided *two years after* his state court Rule 32 petition was filed. *See Reynolds v. Chapman*, 253 F.3d 1337 (11th Cir. 2001). At the time petitioner's Rule 32 petition was filed, there was no Eleventh Circuit case law on point, and therefore, this claim was not "reasonably available" to petitioner's counsel. *Murray*, 477 U.S. at 488. Petitioner also can show that "actual prejudice" would result from a failure to hear this claim because the *Reynolds* decision compels a finding that petitioner's appellate counsel had an actual conflict of interest.

Further, petitioner can avoid procedural default based on the "fundamental miscarriage of justice" exception. As discussed above, the State did not present evidence supporting petitioner's conviction beyond a reasonable doubt. Thus, petitioner can show his "actual innocence" in light of the evidence presented at trial and the new evidence cited in support of his habeas petition. *See Schlup v. Delo*, 513 U.S. 298 (1995).

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that his petition for writ of certiorari be granted, and the judgment of the United States District Court denying petitioner's petition for writ of habeas corpus be vacated. In the alternative, petitioner respectfully requests that his petition for writ of certiorari be granted and the order of the Eleventh Circuit Court of Appeals denying a certificate of appealability be vacated and petitioner's petition for writ of habeas corpus be considered on the merits.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION FOR CERTIFICATE OF APPEALABILITY DATED AND FILED DECEMBER 18, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15708-G

MARK WEAVER,

Petitioner-Appellant,

versus

MICHAEL HALEY,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ R. Lanier Anderson, III
UNITED STATES CIRCUIT JUDGE

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED AND FILED OCTOBER 16, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CASE NO. 01-602-BH-C

MARK WEAVER,

Petitioner,

v.

GRANTT CULLIVER, etc.,

Respondent.

ORDER

This matter is before the Court on Petitioner's Application (Doc. 20) for a Certificate of Appealability. Though it appears that the Petitioner's notice (Doc. 19) of appeal was filed untimely, the Court will consider Petitioner's application.[1] For the reasons stated below, the Court hereby

1. Federal Rule of Appellate Procedure 4(a)(1)(A) provides that a notice of appeal "must be filed with the district clerk within 30 days after the judgment or order appealed from is entered" The Court's judgment (Doc. 18) denying Petitioner's a writ of habeas corpus was entered on September 12, 2002, and the notice (Doc. 19) (Cont'd)

Appendix B

ORDERS that the Petitioner's Application (Doc. 20 for a Certificate of Appealability be **DENIED**.

Title 28, U.S.C., Section 2253(c)(1) (2002) provides:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.

District judges may also issue certificates of appealability under § 2253. Fed.R.App.P. 22(b) (including district judges in the list of officers who can issue certificates of appealability); *see also Hunter v. United States,* 101 F.3d 1565 (11th Cir.1996) (*en banc*) (district court judges are included in the language "circuit justice or judge" and are therefore authorized to issue certificates of appealability under 28 U.S.C. § 2253).

(Cont'd)

of appeal was filed on October 15, 2002, 33 days later. The Court notes that since Petitioner's notice of appeal was filed by "free-world" counsel, Petitioner is not entitled to the prison mailbox rule embodied in Fed. R. App. P. 4(c).

Appendix B

Section 2253(c)(2) provides that a court may issue a certificate of appealability only if the applicant has made "a substantial showing of the denial of a constitutional right." This language resembles the pre-1996[2] standard for issuing certificates of probable cause, where the court looked to see if the petitioner had made a "substantial showing of the denial of a federal right" *Barefoot v. Estelle,* 463 U.S. 880, 893 (1983). Because the language of the pre- and post-1996 standards are so close, the Eleventh Circuit had concluded "that the standard governing certificates of probable cause and certificates of appealability is materially identical," *Hardwick v. Singletary,* 126 F.3d 1312,1313 (11th Cir.1997), and that "[c]ertificates of probable cause are the prior equivalent of certificates of appealability," *Ford v. Haley,* 179 F.3d 1342, 1346 (11th Cir. 1999). Thus, the Court looks to the case law on when to grant a certificate of probable cause. The Supreme Court explained: to make a substantial showing of the denial of a federal right, a petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S. at 893 n.4., *quoting Gordon v. Willis,* 516 F.Supp. 911, 913 (N.D. Ga.1980).

Based on careful consideration of the record, the Court finds that Petitioner has not demonstrated that the issues in this action are debatable among reasonable jurists, that a court

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2. The Antiterrorist and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996), became effective on April 24, 1996, and altered the procedures for habeas corpus appeals.

could resolve these issues in a different manner, or that they deserve encouragement to proceed further. The court concludes that Petitioner has not made "a substantial showing of the denial of a constitutional right," and, thus, that the Petitioner's Application (Doc. 20) for a Certificate of Appealability be and is due to be **DENIED**.

SO ORDERED this 16 day of October, 2002

s/ [illegible]
SENIOR DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED AND FILED SEPTEMBER 12, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CASE NO. 01-0602-BH-C

MARK WEAVER,

Petitioner,

v.

GRANTT CULLIVER, Warden of Holman Prison,

Respondent.

ORDER

After due and proper consideration of all portions of this file deemed relevant to the issues raised, and a *de novo* determination of those portions of the Recommendation to which objection is made, the Recommendation of the Magistrate Judge made under 28 U.S.C. § 636(b)(1)(B) is ADOPTED as the opinion of this Court. It is ORDERED that petitioner's petition for habeas corpus relief is hereby DENIED.

Appendix C

DONE this 12 day of Sept., 2002.

s/ [illegible]
SENIOR DISTRICT JUDGE

APPENDIX D — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED AND FILED AUGUST 20, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION 01-0602-BH-C

MARK WEAVER

Petitioner,

v.

GRANTT CULLIVER,[1] Warden of Holman Prison,

Respondent.

REPORT AND RECOMMENDATION

Mark Weaver, a state prisoner currently in the custody of respondent, has petitioned this Court for federal habeas corpus relief pursuant to 28 U.S.C. § 2254. Weaver challenges the validity of his conviction in 1997 by a jury in the Circuit Court of Mobile County, Alabama, on the charge of fast degree burglary for which Weaver received a sentence of life imprisonment without the possibility of parole under the

1. Grantt Culliver is being substituted as respondent since he is presently the warden at Holman Correctional Facility.

Habitual Felony Offender Act ("HFOA"). (Doc. 11, Ex. 5 at 3, Case Action Summary).[2] This matter is now before the Court on Weaver's petition and brief, respondent's answer, court records, and briefs on appeal.[3]

I. FINDINGS OF FACT

1. On the evening of February 17, 1996, Zonnie Weaver drove his brothers Mark and Ammon Weaver to Road Street in Citronelle, Alabama, so that Mark and Ammon could purchase crack cocaine. (Doc. 11, Respondent's Answer, Ex. 5 at 12-13, hearing transcript). The area near the street light on Road Street was well known for drug dealing. (Doc. 11, Ex. 1 at 249-53, 263, trial transcript). After purchasing drugs from two males, the Weavers drove away, only to discover that they had been sold fake crack cocaine. (Doc. 11, Ex. 1 at 243, trial transcript; Doc. 11, Ex. 5 at 13, hearing transcript).

2. Christy Cole ("Cole") and her boyfriend Bruce Brooks ("Brooks") were chopping firewood outside their house on Road Street when the buy occurred and witnessed the drug transaction. (Doc. 11, Ex. 1 at 240-43). According to Cole, Mark Weaver was the one with the money, and he made the

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2. Unless otherwise stated, reference to "exhibits" in this opinion refers to exhibits to respondent's answer.

3. Following a careful review of the record and exhibits, the undersigned Magistrate Judge has concluded that there are sufficient facts and information upon which the issues under consideration may be properly resolved. Therefore, no evidentiary hearing is required upon the issues. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11 (1992).

buy from two dealers whom Cole knew as "Slim" and "Funk." (*Id.* at 251, 257). That night, Slim was wearing a "starter jacket" with "Georgetown" written across the back of it. (*Id.* at 257).

3. After discovering that they had been cheated, Mark and Ammon Weaver returned to Road Street and asked Cole's boyfriend, Brooks; where "the guys" had gone, referring to the two males who had sold them drugs. (*Id.* at 243-45, 254). Brooks told them that he thought they had gone down the street. (*Id.* at 244). Unconvinced, Mark Weaver put a knife to Brooks' throat and threatened to "take [his] fucking head off" (Id). Brooks yelled to Cole to go and call the police, and Cole ran to the trailer next door to use the telephone. (*Id.* at 245, 254). As Cole ran, she saw Zonnie Weaver drive up in the truck and heard him yell, "there goes one of the little motherfuckers there." (*Id.* at 254). Mark and Ammon dropped Brooks, and the three brothers pursued Cole. (*Id.* at 254).

4. In the trailer next door were Frederick Kelly ("Kelly"), his wife, Kathy Kelly, their nephew Cedric James ("James"), and five children. (*Id.* at 112, 114-115). When Cole arrived, James was talking on the telephone, holding his nine-month-old baby in his lap. (*Id.* at 118, 170, 188, 230-31, 246-47). Frightened, Cole told them to "shut the door and lock it." (*Id.* at 170, 188).

5. Within approximately three to five minutes of Cole's arrival, the Weaver brothers opened the door and entered the Kellys' trailer. (*Id.* at 121, 145, 156-59; 212, 255). Seeing Frederick Kelly, one of the Weavers said: "[t]hat's him."

(*Id.* at 213-14). Another Weaver brother disagreed, stating: "no," "he was lighter skin[ned]." (*Id.*). The Weavers then turned their attention to James and agreed: "that's him right there."[4] (*Id.* at 160, 189-90, 213-15). Mark Weaver pulled a knife, and he and Ammon began attacking James, while Zonnie Weaver stood by and prevented anyone from helping James. (*Id.* at 133-34, 140, 145-46, 161-62). James was stabbed once in the leg and once in the stomach (*Id.* at 163, 165).

6. Seeing that one of the Weavers had a knife, Kathy Kelly began trying to get the children out of the trailer. (*Id.* at 118-20). Frederick Kelly left the living room and retrieved a gun located in his bedroom at the other end of the trailer. (*Id.* at 213-16). He loaded the gun with one buck shot shell and returned to the living room. (*Id.* at 216). By the time he returned, the fight had moved to the hallway at the other end of the trailer, and, according to Kelly, he did not fire because his wife and children were in that area. (*Id.* at 216, 236). When Kelly observed the Weavers coming back up the hallway, he went outside and hid behind the door. (*Id.* at 216-17).

7. James eventually retreated to a bathroom occupied by one of the children, and the Weaver brothers left. (*Id.* at 165). As they were leaving, James heard them say: "he was the wrong one." (*Id.*). Realizing after the Weavers left the trailer that he had been stabbed, James grabbed a pellet gun resting beside the front door, ran outside, and hit Mark Weaver in the back of the head with the gun. (*Id.* at 163-66,

4. James was wearing a "starter jacket" with "Michigan" written on it (*Id.* at 164-65, 258).

197-98). Mark dropped the knife, and Ammon picked it up and ran after James, who retreated back into the trailer. (*Id.* at 166).

8. As the Weavers turned and began to walk away, Kelly yelled: "I ought to shoot the hell out of all three of [you]" (*Id.* at 217). Hearing this remark, the Weavers turned around and walked back toward Kelly, Ammon Weaver holding the knife. (*Id.* at 218, 234-35, 238). As they approached, Kelly repeated: "[a]ll right now," but they kept coming. (*Id.* at 218). Kelly fired a shot, killing Ammon Weaver and injuring Mark and Zonnie. (*Id.* at 195-96, 218-19). Kelly then hid the gun under a piece of tin behind the trailer and ran to the end of the fence row on his property. (*Id.* at 218). When he saw a police car approaching, Kelly flagged it down and told the officer that he "had shot some boys up there." (*Id.* at 218, 260, 262).

9. After the police arrived, Cedric James, Zonnie Weaver, and Mark Weaver were all taken to hospitals for treatment. (Doc. 1 at 10, habeas petition). James remained in the hospital for a week where he was treated for stab wounds to his leg and stomach. (Doc. 11, Ex. 1 at 163-64, trial transcript).

10. Mark and Zonnie Weaver were subsequently taken to the police station for questioning where they were arrested on assault charges. (Doc. 1 at 10, habeas petition). The assault charges were later changed to first degree burglary, and Mark and Zonnie Weaver were indicted on those charges on April 15, 1996. (Doc. 1 at 13, habeas petition; Doc. 11, Ex. 5 at 1, 180, Case Action Summaries).

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11. Frederick Kelly was also arrested and charged with murder in the death of Ammon Weaver and assault against Mark and Zonnie Weaver. (Doc. 1 at 10-11, habeas petition). A grand jury subsequently refused to indict him on those charges. (*Id.*).

12. At the Weaver's trial, attorney Robert Clark represented Mark Weaver, and court-appointed attorney Ed Tibbetts represented Zonnie Weaver. (Doc. 11, Ex. 5 at 1, 180, Case Action Summaries). On June 24, 1997, in a consolidated trial in the Circuit Court of Mobile County, Alabama, a jury found Mark and Zonnie Weaver guilty of first degree burglary under *Alabama Code* § 13A-7-5. (*Id.* at 3, 182). On June 26, 1997, both Mark and Zonnie Weaver were sentenced to life in prison without the possibility of parole under the Habitual Felony Offender Act. (*Id.*).

13. On that same date, Mark and Zonnie Weaver gave oral notice of appeal of their convictions and sentences to the Alabama Court of Criminal Appeals. (*Id.*). They were represented on appeal jointly by Mark Weaver's trial counsel, Robert Clark. (*Id.* at 4, 183). In that appeal, the Weavers raised only one issue: whether the trial court impermissibly commented on the evidence during its oral charge to the jury by stating that "the law does not give a person who feels cheated in a drug transaction any permission, right or justification to enter uninvited into the dwelling of any other person for any purpose." (Doc. 11, Ex. 2 at 7, 12, appellants' brief).

14. On January 30, 1998, the Alabama Court of Criminal Appeals affirmed the Weavers' convictions and sentences,

and, on March 6, 1998, the court overruled their application for rehearing. (Doc. 11, Ex. 4 at 3, Order, Doc. 1 at 27, habeas petition). The Alabama Supreme Court denied their petition for a writ of certiorari on June 26, 1998. *Ex parte Weaver*, 733 So.2d 496 (Ala. 1998) (table).

15. On June 9, 1999, Mark Weaver filed a petition in Mobile County Circuit Court under Rule 32 of the *Alabama Rules of Criminal Procedure*, seeking collateral relief from conviction and sentence. (Doc. 11, Ex. 5 at 5, Case Action Summary). In the Rule 32 petition, Weaver raised multiple issues related to ineffective assistance of counsel at trial and on appeal and various trial court errors. (Doc. 11, Ex. 5 at 38-136, Rule 32 petition). On March 3, 2000, the state circuit court conducted an evidentiary hearing on the Rule 32 petition, at which time Mark Weaver, Zonnie Weaver, and their respective trial attorneys, Robert Clark and Ed Tibbetts, testified. (Doc. 11, Ex. 5 at 2, hearing transcript). On March 20, 2000, the state circuit court denied the Rule 32 petition for relief. (Doc. 11, Ex. 5 at 6, Case Action Summary; Doc. 11, Ex. 5 at 171, Order).

16. Mark Weaver appealed the denial of his Rule 32 petition to the Alabama Court of Criminal Appeals, and, although the court initially dismissed the appeal as untimely filed, it reinstated the appeal on June 12, 2000. (Doc. 11, Ex. 5 at 7, Case Action Summary; Doc. 11, Ex. 5 at 339, Order). On June 22, 2001, the Alabama Court of Criminal Appeals affirmed the circuit court's denial of Weaver's Rule 32 petition for relief and, on July 20, 2001, overruled Weaver's application for rehearing, issuing a certificate of judgment of affirmance on August 8, 2001. (Doc. 11, Ex. 11 at 3, Order; Doc. 11, Ex. 15, Order, Doc. 11, Ex. 20, Order).

17. Weaver filed a petition for a writ of certiorari with the Alabama Supreme Court on August 6, 2001, which that court dismissed on August 8, 2001, as untimely filed. (Doc. 1 at 28, habeas petition; Doc. 11, Ex. 18, Order). Following that dismissal, Weaver filed the instant habeas petition on August 22, 2001. (Doc. 1, habeas petition). On January 29, 2002, the Alabama Supreme Court issued an order reinstating Weave's petition for certiorari review. (Doc. 11, Ex. 21, Order). The Alabama Supreme Court ultimately denied the petition on March 8, 2002. (Doc. 11, Ex. 23, Order).

18. In the instant habeas petition, Weaver asserts the following claims as bases for federal habeas relief: (1) ineffective assistance of trial counsel (Doc. 1 at 30-120, habeas petition); (2) ineffective assistance of appellate counsel (*Id.* at 121-51); (3) insufficient evidence to support his burglary conviction (*Id.* at 151-54); and (4) violation of his Fourteenth Amendment right to equal protection through prospective application of the May 25, 2000, amendment to the Habitual Felony Offender Act (*Id.* at 154-569).

For the reasons discussed below, the Court finds that Weaver's petition is due to be dismissed. The Court will consider each of his claims in turn.

II. CONCLUSIONS OF LAW

A. *Timeliness of habeas petition.*

1. In his answer, respondent argues that all of Weaver's habeas claims are time barred under 28 U.S.C. § 2244(d)(1) because more than one year elapsed between the conclusion

of Weaver's direct appeal and the filing of his habeas petition. (Doc. 11 at 5, Respondent's Answer). Respondent's argument is incorrect, however.

2. The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a one year statute of limitations on all habeas corpus petitions. *Drew v. Department of Corrections,* 2002 WL 1585532, *3 (11th Cir. July 18, 2002); *Ford v. Moore*, 2002 WL 1426556, *2 (11th Cir. July 2, 2002) (citing 28 U.S.C. § 2244(d)(1) (2000)). Section 2244(d)(l) provides in pertinent part:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitations period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; . . . .[5]

3. While a petitioner has only one year to file a habeas petition after the conclusion of direct review in state court, the one-year limitations period is tolled while "'a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.'" *Ford*, 2002 WL 1426556, *2 (quoting § 2244(d)(2)); *see also Drew,* 2002 WL 1585532, * 3. Section 2244(d)(2) provides:

> The time during which a properly filed application for State post conviction or other collateral review

5. Only subsection (A) of § 2244(d)(l) is relevant to this case.

> with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

4. The record shows that Weaver's direct appeal was concluded on June 26, 1998, when the Alabama Supreme Court denied his petition for a writ of certiorari related to his conviction and sentence. *See Ex parte Weaver,* 733 So. 2d 496 (Ala. 1998) (Table). On June 9, 1999, seventeen days short of one year, Weaver filed a petition for post-conviction relief under Rule 32 of the *Alabama Rules of Criminal Procedure*, tolling the one-year limitations period for filing a habeas petition.

On March 20, 2000, the state circuit court denied Weaver's petition for Rule 32 relief, and Weaver appealed that denial to the Alabama Court of Criminal Appeals on April 27, 2000. (Doc. 11, Ex. 5 at 6-7, Case Action Summary; Doc. 11, Ex. 5 at 174, Notice of Appeal; Doc. 11, Ex. 5 at 171, Order). On May 9, 2000, the Court of Criminal Appeals dismissed the appeal as untimely; however, it reinstated the appeal on June 12, 2000. (Doc. 11, Ex. 5 at 7, Case Action Summary; Doc. 11, Ex. 5 at 339, Order). The Court of Criminal Appeals affirmed the circuit court's denial of Weaver's Rule 32 petition on June 22, 2001, and overruled Weaver's application for rehearing on July 20, 2001. (Doc. 11, Ex. 11 at 3, Order; Doc. 11, Ex. 15, Order). On August 3, 2001, Weaver filed a petition for a writ of certiorari with the Alabama Supreme Court, which that court dismissed on August 8, 2001, as untimely. (Doc. 1 at 28, habeas petition; Doc. 11, Ex. 18, Order). On that same date, August 8, 2001, the Court of Criminal Appeals issued a certificate of judgment

affirming the judgment of the circuit court. (Doc. 11, Ex. 20). However, on January 29, 2002, the Alabama Supreme Court granted Weaver's motion to set aside the dismissal and reinstated the appeal, and the Court of Criminal Appeals recalled the certificate of judgment issued on August 8, 2001. (Doc. 11, Ex. 21, Order; Doc. 11, Ex. 22, Order). On March 8, 2002, the Alabama Supreme Court denied Weaver's petition for a writ of certiorari and issued a final certificate of judgment. (Doc. 11, Ex. 23, Order). Weaver filed the instant habeas petition on August 22, 2001, prior to the Alabama Supreme Court's reinstatement of his appeal. (Doc. 1, habeas petition).

5. Respondent does not dispute that Weaver's application for Rule 32 relief was "properly filed," nor does he dispute that Weaver's appeals related to the Rule 32 petition were timely and properly filed. Respondent also does not dispute that, if properly filed, the time for filing a habeas petition is tolled during the pendency of the Rule 32 petition. Rather, Respondent simply argues that the Rule 32 petition was not pending, and the limitations period was not tolled, during the time that elapsed between the state courts' dismissals and reinstatements of Weaver's appeals, causing the statute of limitations to expire. This Court disagrees.

6. Notwithstanding the intervening dismissals and reinstatements of Weaver's appeals by both the Alabama Court of Criminal Appeals and the Alabama Supreme Court, a judgment of the Alabama appellate courts "is not final until that court issues its certificate of judgment," and the filing of an application for rehearing in the appellate court or a petition for a writ of certiorari in the Alabama Supreme Court

will stay the issuance of that certificate. *Ex parte Tiongson*, 765 So. 2d 643, 643 (Ala. 2000) (citing Rule 41, *Ala. R. App. P.*); *Ash v. State*, 2002 WL 732100, * 1 (Ala. Crim. App. April 26, 2002). In this case, the Alabama Court of Criminal Appeals issued a certificate of judgment on August 8, 2001, only to recall that certificate of judgment when the Alabama Supreme Court reinstated Weaver's petition for a writ of certiorari on January 29, 2002. (Doc. 11, Ex. 20; Doc. 11, Ex. 21; Doc. 11, Ex. 22). The Alabama Supreme Court then issued its final certificate of judgment denying Weaver's petition for a writ of certiorari related to the Rule 32 petition on March 8, 2002, well after Weaver had filed his habeas petition on August 22, 2001. (Doc. 11, Ex. 23; Doc. 1). Therefore, Weaver's Rule 32 petition was still "pending," and the limitations period still tolled, when Weaver filed his habeas petition. *Cf. Neal v. Ahitow*, 8 F. Supp. 2d 1117, 1119-20 (C.D. Ill. 1998) (holding that post-conviction petition for relief was "pending" for purposes of § 2244(d)(2) "as long as the state court or the state post-conviction procedures allow for review," including the nine month period that elapsed between review by the Illinois Court of Appeals and petitioner's motion seeking permission to appeal to the Illinois Supreme Court, since the Illinois Supreme Court ultimately granted petitioner leave to appeal). Accordingly, because the one-year limitations period was tolled when Weaver filed his habeas petition in this case, the petition is not time barred under the AEDPA.

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B. *Petitioner's claims.*

i. *Claim I.*

7. Weaver first argues in his petition that he is entitled to relief under § 2254 on the basis of ineffective assistance of his trial counsel, Robert Clark ("Clark"). (Doc. 1 at 30-120, habeas petition). Weaver's numerous ineffective assistance of trial counsel claims can be broken down into the following categories:

(a) failure to participate at trial;[6]

(b) failure to conduct meaningful pretrial investigation and to file appropriate pretrial motions;[7] and

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6. This includes failing to object to prosecutorial misconduct such as commenting on the grand jury's failure to indict Fred Kelly, vouching for prosecution witnesses, inserting personal opinion, and appealing to the jury's emotions (Doc. 1 at 84-88, habeas petition); failing to submit jury charges and object to erroneous or missing instructions (*id.* at 89-110); failing to question the jury venire about their knowledge of the case prior to trial; failing to point out inconsistencies between the State's promised evidence and the evidence actually produced; failing to point out inconsistencies in the testimony of the State's witnesses; failing to point out the non-credibility of the State's witnesses; failing to cross-examine prosecution witnesses about their motives to lie; failing to call witnesses and produce evidence promised; and failing to argue insufficiency of State's evidence. (*Id.* at 66-84).

7. This includes failing to file a motion in limine concerning the grand jury's actions related to Fred Kelly (Doc. 1 at 44-48, habeas petition); failing to file a motion for production of all physical evidence

(Cont'd)

(c) failure to advise petitioner and to raise proper objections concerning issues of joint trial, prior convictions, right to testify, and Alabama's Habitual Felony Offender Act.[8]

8. In his Rule 32 petition before the state circuit court, Weaver raised the same ineffective assistance claims asserted against Clark here. (Doc. 11, Ex. 5 at 38-128, 151-58, Rule 32 petition). In reaching its decision to deny Weaver's Rule 32 petition, the state circuit court considered the claims on the merits, finding that Clark's representation was not ineffective and stating in pertinent part:

> A hearing was held on the application for relief under Rule 32. The petition is denied. . . .

(Cont'd)

and to compel the same, including the knife, James' jacket, videotaped statements, blood evidence, and DNA evidence (*id.* at 58-62); failing to obtain essential documents, including Mark, Zonnie, and Ammon Weaver's medical records, and James' medical records (*id.* at 63-66); failing to file essential pretrial motions to obtain criminal records of the prosecution's witnesses and grand jury testimony, failing to file a pretrial motion to sequester witnesses from the courtroom, and failing to file a pretrial motion for a change of venue. (*Id.* at 54-58).

8. This includes failing to explain Alabama's Habitual Felony Offender Act; failing to prepare Weaver to testify (Doc. 1 at 66, 70, habeas petition); failing to provide case law at sentencing to aid in the interpretation of the Habitual Felony Offender Act and the application of prior convictions of more than ten years (*id.* at 110-13); and failing to argue the unconstitutionality of the Habitual Felony Offender Act. (*Id.* at 113-16).

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1. The court finds that counsel was not ineffective in his investigation of the scene, the evidence, or the witnesses or in his efforts to obtain, secure or introduce evidence or witnesses.

2. The court finds that counsel was not ineffective in cross examination of the State's witnesses and in arguing the case to the jury.

3. The court finds that counsel fully advised his client about the ramifications of his six prior felony convictions with respect to the giving of testimony and with respect to their potential impact upon sentencing if petitioner were convicted as charged, and when plea offers were made; and that counsel made no prejudicial errors in this regard.

4. The court finds that counsel did not make errors during pretrial or trial proceedings that were prejudicial to the petitioner.

5. The court finds that counsel rendered effective assistance and zealously represented the petitioner throughout all proceedings, conferring with him, advising him, consulting with him, and keeping him fully informed to enable him to make decisions personal to him. The court finds the strategic decision to present a joint defense did not prejudice the petitioner and does not amount to ineffective assistance of counsel.

. . .

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> In order to succeed on a claim of ineffective assistance of counsel, the petitioner has the burden to show that "[f]irst, . . . counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984). Petitioner has failed to meet the burden to show counsel was ineffective under the criteria of *Strickland.* Accordingly, the petition is denied.

(Doc. 11, Ex. 5 at 171-73, Order).

9. Likewise, in its decision affirming the state circuit court's denial of Weaver's petition for Rule 32 relief; the Alabama Court of Criminal Appeals considered Weaver's ineffective assistance of counsel claims against Clark on the merits, stating in pertinent part:

> The Weavers' numerous ineffective assistance of counsel claims are properly before this Court. We note again that the trial court conducted a lengthy evidentiary hearing at which Mark and Zonnie Weaver and their respective trial counsel, Robert Clark and Ed Tibbetts, testified. The Weavers' Rule 32 counsel, Ronald Sullivan, and Martha

> Tierney, an assistant district attorney in Mobile County, did a good job of exploring the various issues of ineffective assistance of trial counsel that were raised in the petitions. After carefully examining the transcript of the hearing, as well as the briefs and arguments on appeal, and without specifically dissecting each of the Weavers' claims, suffice it to say that we do not find trial counsel's assistance to be constitutionally defective under the standard enunciated in *Strickland v. Washington*, [466] U.S. 668 (1984). There is a strong presumption that counsel's performance was reasonable and adequate, and this court is highly deferential to choices made at trial that are arguably dictated by a reasonable trial strategy. Although it is abundantly clear from the transcript of the evidentiary hearing that Mr. Sullivan would have taken a much different approach in representing the Weavers at trial, the fact that a different approach may have been reasonable under the circumstances does not dictate the conclusion that the approach taken by the Weavers' trial counsel was unreasonable, much less constitutionally deficient. This Court is not interested in grading lawyers' performances; this Court is only interested in whether the adversarial process at trial, in fact, worked adequately. See *Waters v. Thomas*, 46 F.3d 1506, 1511-12 (11th Cir. 1995).

(Doc. 11, Ex. 11 at 2, Order). The Court of Criminal Appeals concluded, as the state circuit court had, that Weaver had failed to establish that Clark's performance was constitutionally deficient under *Strickland.* (*Id.*).

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10. Weaver filed the instant petition for a writ of habeas corpus in this Court on August 22, 2001. (Doc. 1, petition). Therefore, his case is governed by 28 U.S.C. § 2254 as amended by the AEDPA. *See Williams v. Taylor*, 529 U.S. 362, 402 (2000); *Bottoson v. Moore,* 234 F.3d 526, 530 (11th Cir. 2000). As amended, § 2254 now provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) & (2). The Act, as amended, presumes as correct all determinations of factual issues made by a state court and places the burden upon the petitioner of rebutting such a presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e).

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In *Williams,* the United States Supreme Court held that § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.

> Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied —the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13; *see also Bottoson,* 234 F.3d at 531 ("In addition, a state court decision involves an unreasonable application of Supreme Court precedent 'if the state court either unreasonably extends a legal principle from

[Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.'").

11. Having carefully considered Claim I of Weaver's habeas petition, this Court finds that Weaver has failed to establish entitlement to relief under § 2254(d)(1). Weaver has failed to show under the "contrary to" clause that the state circuit court or the Alabama Court of Criminal Appeals arrived at a conclusion opposite to that reached by the United States Supreme Court on a question of law or that either court decided the case differently than the Supreme Court did in a previous case presenting a set of materially indistinguishable facts. Moreover, under the "unreasonable application" clause, Weaver has failed to establish that either of these state courts, though recognizing the correct governing principles from the Supreme Court's decisions, unreasonably applied those principles to the facts in this case.

As discussed above, the issues encompassed in Claim I of the instant habeas petition were addressed on the merits by the state circuit court and the Court of Criminal Appeals, and both courts recognized the applicability of Strickland. (Doc. 11, Ex. 5 at 171-73, Order; Doc. 11, Ex. 11 at 2, Order). In addition, in denying Weaver's Rule 32 petition for relief, both courts reasonably applied the principles outlined in *Strickland* to the facts of the case, finding that Clark had provided Weaver effective assistance. (*Id.*).

12. This Court likewise finds that Weaver did not satisfy the two-pronged standard set forth in *Strickland* with respect to his ineffective assistance of counsel claims against Clark.

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In order to establish a claim of ineffective assistance of counsel, a petitioner is required to show: (1) that his attorney's representation fell below "an objective standard of reasonableness" and (2) that a reasonable probability exists that, but for counsel's unprofessional conduct, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 694. "Establishing these two elements is not easy: 'the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between.'" *Van Poyck v. Florida Dep't of Corrections*, 290 F.3d 1318, 1322 (11th Cir. 2002) (quoting *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995)).

> For assessing a lawyer's performance, *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000) (en banc) *cert. denied*, 531 U.S. 1204, 121 S. Ct. 1217, 149 L. Ed. 2d 129 (2001), sets out the basic law: "Courts must indulge the strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 1314 (internal marks omitted). This presumption of correctness applies when a petitioner is challenging his lawyer's act in not presenting certain mitigating evidence. *See Bolender v. Singletary*, 16 F.3d 1547, 1557 (11th Cir. 1994) ("A lawyer's election not to present mitigating evidence is a tactical choice accorded a strong presumption of correctness which is *virtually unchallengeable*.").
>
> . . .

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> A petitioner's burden of establishing that his lawyer's deficient performance prejudiced his case is also high. "It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. Virtually every act or omission of counsel would meet that test." *Strickland*, 104 S. Ct. at 2067. Instead, a petitioner must establish that a reasonable probability exists that the outcome of the case would have been different if his lawyer had given adequate assistance. *See Id.* at 2068.

Van Poyck, 290 F.3d at 1322-23 (emphasis in original). When applying the *Strickland* standard, courts "are free to dispose of ineffectiveness claims on either of its two grounds." *Oats v. Singletary*, 141 F.3d 1018, 1023 (11th Cir. 1998).

13. In his petition, Weaver expresses dissatisfaction with virtually every aspect of Clark's representation. Weaver complains that Clark failed to conduct a "meaningful" pretrial investigation. (Doc. 1 at 30). However, the record shows that, when Clark and Tibbetts began their representation, they met with the Weaver brothers, investigated the crime scene, and interviewed the police officers involved. (Doc. 11, Ex. 5 at 105-07, hearing transcript).

Weaver complains that Clark failed to consider the ramifications of consolidating his trial with that of his brother, Zonnie, and failed to oppose the consolidation. (Doc. 1 at 51). However, the record shows that the trial court consolidated Mark and Zonnie Weaver's cases over Clark's "fierce[]" objections. (Doc. 11, Ex. 5 at 107).

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Weaver complains that Clark should have filed a motion in limine to prevent the prosecutor from informing the jury during opening statement that a grand jury "no billed" an indictment against Kelly for the death of Ammon Weaver. With the benefit of hindsight, one could argue that every item of evidence proffered by the State and every unfavorable comment made by the prosecution during the trial should have been the subject of a pretrial motion in limine. However, in order to establish ineffective assistance of counsel, Weaver must show that Clark's decision not to seek a preliminary ruling from the trial court on the admissibility of this evidence was unreasonable and that, but for this failure, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 689, 694. This he has failed to do. As for Clark's failure to object to the comment at trial, the record shows that Clark did object to the second of two such remarks by the prosecutor, and the trial court sustained the objection. (Doc. 11, Ex. 1 at 99, 110, trial transcript). Assuming that Clark's failure to object to the first of the two remarks was error, Weaver's claim of ineffective assistance still fails because he has not shown that a reasonable probability exists that, but for the error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 694.

Weaver complains that Clark should have sought production of certain items of physical evidence including the knife, James' jacket, James' medical records, videotaped statements made by himself, Zonnie Weaver, and Frederick Kelly, and blood and DNA evidence. However, Clark testified at the Rule 32 hearing that he did not want the knife, the videotaped statements, or James' medical records produced because of the risk of prejudice to the defense from

"highlighting" the items in front of the jury. (Doc. 11, Ex. 5 at 86-96, 103-04). Clark further testified that he did not pursue other evidence, such as DNA evidence and fingerprints, because such evidence either did not exist or would have been unhelpful to the defense. (*Id.* at 89-92). Moreover, with regard to the videotaped statements, Tibbetts testified that he filed a motion for production of these videotaped statements, but the statements had been lost by the district attorney's office. (Doc. 11, Ex. 5 at 104-05). Tibbetts secured a ruling from the trial court that no reference to the videotapes, detrimental to either of the Weavers, would be admitted at trial. (*Id.*).

Weaver complains that Clark should have filed a motion for production of the record of the Kelly grand jury proceedings based on Weaver's assumptions that the witnesses who testified against him in his burglary trial would also have testified in the Kelly grand jury proceedings and that their testimony in the Kelly grand jury proceedings would have been inconsistent with their testimony at his burglary trial. However, there is no basis for these assumptions.

The record shows that only five people testified at Weaver's burglary trial: (1) Kathy Kelly, who testified that the Weavers entered her home without permission, pulled a knife, and began attacking her nephew, Cedric James (Doc. 11, Ex. 1 at 116-22, trial transcript); (2) Frederick Kelly, who testified that the Weavers entered his home without permission and began attacking his nephew and that he shot them outside his trailer when they approached him (*Id.* at 212-18); (3) Cedric James, who testified that the Weavers entered his home and beat and stabbed him

(*Id.* at 157-64); (4) Christy Cole, who testified that Mark Weaver threatened to decapitate her boyfriend and that be and his brothers chased her into the Kellys' trailer and everything "rent haywire" (*Id.* at 241-47); and (5) Corporal Matt Dyess of the Citronelle Police Department, who testified, among other things, that he secured the scene, conducted an investigation, and made a videotape of Mark Weaver at the police station. (*Id.* at 259-62, 284-86).

While, perhaps, one could logically assume that some of those witnesses may have also testified in the Kelly grand jury proceedings, one could not logically assume that any of them testified *against* Kelly or that any such testimony was inconsistent with their testimony against Weaver in his burglary trial To the contrary, the same testimony which convinced a jury to convict Weaver of burglary would easily support a decision by a grand jury to "no bill" an indictment against Kelly on charges of murder and assault arising out of those same events. Therefore, Weaver's claim that Clark was ineffective for failing to obtain the Kelly grand jury record is without merit.

As for Clark's representation during Weaver's trial, the record shows that Clark assumed the lead role for the defense; he made suitable opening and closing remarks; he conducted thorough cross-examinations of the State's witnesses; and he raised appropriate objections. (Doc. 11, Ex. 1 at 99, 101-316, trial transcript). Weaver complains, however, that Clark should have requested various jury charges, including, for example, a jury charge on the definition of "dwelling" as an element of the offense of first degree burglary under *Alabama Code* § 13A-7-5. (Doc. 1 at 89-110). That section

provides in part that: "[a] person commits the crime of burglary in the first degree if he knowingly and unlawfully enters or remains unlawfully in a dwelling with intent to commit a crime therein, ..." *Alabama Code* § 13A-7-1 defines dwelling as: "[a] building which is used or normally used by a person for sleeping, living or lodging therein." While the trial court did not define "dwelling" in its instructions to the jury, the record clearly shows that the building in question in this case was a house trailer where the Kellys lived with their children. (Doc. 11, Ex. 1 at 112, 114-115, trial transcript). Given the fact that the definition of dwelling would only have further supported a finding that Weaver was guilty of first degree burglary, Clark's failure to request the instruction was not unreasonable. Weaver's arguments regarding the other jury instructions that he claims should have been requested are likewise without merit.

Weaver complains that Clark failed to inform him of the ramifications of Alabama's Habitual Felony Offender Act and the effect of his six prior felony convictions on his sentence. However, at the Rule 32 hearing in state court, Clark testified that he informed both Mark and Zonnie Weaver that, in light of their prior felony convictions, if they were convicted at trial, they would face life without the possibility of parole. (Doc. 11, Ex. 5 at 66, 102, hearing transcript). Clark testified: "I told both of them, you're going to prison and you're going to prison for the rest of your natural life on the face of the planet, I told them that." (*Id.* at 102). Clark further testified that he used "very forceful" language trying to convince the Weavers to take a plea agreement that had been offered by the prosecution. (*Id.* at 66). According to Clark, he "did everything humanly possible to talk these gentleman (sic)

into taking the fifteen split." (*Id.* at 101). Clark stated: "we did everything but beat them to death and drag them in the courtroom to get them to do that and they just wouldn't do it."[9] (*Id.* at 101-02). Tibbetts confirmed Clark's testimony in this regard. (*Id.* at 127-28).

Weaver complains that Clark should have argued that the Habitual Felony Offender Act was unconstitutional for violating his Fourteenth Amendment right to due process, the Eighth Amendment proscription against cruel and unusual punishment, and the concept of separation of powers. However, the Alabama courts have consistently rejected constitutional challenges to the Habitual Felony Offender Act on these grounds. *See, e.g., Wooden v. State*, 2000 WL 336957, * 3 (Ala. Crim. App. March 31, 2000); *Tyler v. State*, 683 So. 2d 1062, 1064 (Ala. Crim. App. 1995); *Frazier v. State*, 663 So. 2d 1035, 1037 (Ala. Crim. App. 1995), and the cases cited therein.

Weaver complains that Clark should have moved to exclude his prior felony convictions from consideration at sentencing. (Doc. 1 at 48; Doc. 11, Ex. 1, at 370-73, trial transcript). In fact, Clark did object to the court's consideration of any of Weaver's prior convictions older than ten years, which accounted for five of Weaver's six prior felony convictions. (Doc. 11, Ex. 1 at 369, 370-73). Because, under Alabama law, there is no time limit on prior felony convictions that may be considered under the HFOA, the trial

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9. The record reflects that Mark Weaver eventually agreed to take the plea agreement; however, the prosecutor made the agreement contingent on both brothers accepting, and Zonnie Weaver refused to accept it. (Doc. 11, Ex. 5 at 100-02, hearing transcript).

court did not err in considering the prior convictions. *See Gwynne v State*, 499 So. 2d 802, 810 (Ala. Crim. App. 1986) (rejecting appellant's remoteness argument in connection with prior felony convictions to be considered under the HFOA, stating: "'No age limit on convictions which may be used to enhance punishment has been prescribed by the legislature and, therefore, it can only be assumed that none was intended.'"); *Long v. State*, 446 So. 2d 658, 660 (Ala. Crim. App. 1983) (holding that, in applying the HFOA, "[t]he trial court did not err in considering felony convictions which had been obtained thirteen years previously in sentencing appellant. . . .").

Weaver complains that Clark should have advised him of his right to testify and, presumably, should have advised him to testify. At the Rule 32 hearing, Clark testified that he did not advise Weaver to testify at trial because of his prior felony convictions and the chance that the judge might allow them into evidence for impeachment purposes or to show intent. (Doc. 11, Ex. 5 at 79-80). As discussed above, the record shows that, at the time of trial, Weaver had six prior felony convictions, four of which were for burglary. (Doc. 11, Ex 1, at 370-73, trial transcript). Faced with the risk that one or more of the prior felony convictions could be admitted into evidence and that Weaver could be subjected to a potentially devastating cross-examination by the State, Clark's decision to keep Weaver off the stand could not be considered unreasonable.

14. Having reviewed each of the claims made by Weaver against Clark, the Court finds that Weaver has failed to show that Clark's representation fell below "an objective standard

of reasonableness" with respect to any of the allegations on which Claim I of the instant habeas petition is based. Therefore, Weaver has failed to satisfy the first prong of the *Strickland* standard. Moreover, even assuming that Clark's representation fell below an objective standard of reasonableness with regard to any of the matters alleged in Claim I, Weaver has failed to establish that a reasonable probability exists that, but for those alleged failures, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 694. Accordingly, Weaver has failed to satisfy the second prong of the *Strickland* standard, as well.

15. Finally, Weaver has failed to establish entitlement to relief under § 2254(d)(2) by showing that the decisions of either the state circuit court or the Alabama Court of Criminal Appeals were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. As discussed above, this Court must presume as correct the determinations of all factual issues made by these courts. Weaver has not rebutted that presumption of correctness by clear and convincing evidence. Accordingly, Claim I fails for this reason, as well.

ii. *Claim II.*

16. Next, Weaver argues in his habeas petition that he is entitled to relief under § 2254 on the basis of Clark's ineffective assistance of counsel on appeal. (Doc. 1 at 121-51, habeas petition). Weaver's numerous ineffective assistance of appellate counsel claims against Clark can be broken down into the following categories:

(a) failure to raise on appeal numerous issues concerning prosecutorial misconduct, trial

court error, and the unconstitutionality of the Habitual Felony Offender Act;[10]

(b) failure to raise on appeal the issue of insufficiency of the evidence; and

(c) conflict of interest arising out of Clark's joint representation of Mark and Zonnie Weaver on appeal.

Claims II (b) and (c) related to insufficiency of the evidence and conflict of interest were not raised by Weaver in his Rule 32 proceedings in state court and, thus, will be addressed separately below. The remaining ineffective

10. This includes failing to raise on appeal prosecutorial misconduct; failing to raise the unconstitutionality of the Habitual Felony Offender Statute and the unconstitutional application of the Habitual Felony Offender statute; failing to raise trial court errors including failure to charge the jury on the definition of "dwelling" as an element of offense of burglary and the lesser included offenses of burglary, refusing to allow counsel to inquire into whether James was a known drug salesman, improper participation in in-court identification of defendants, improper comments that trailer was a "dwelling," improper comment that being cheated in drug deal does not justify entering someone's dwelling uninvited, improper instructions concerning the element of intent to commit a felony, improper instructions concerning "deadly weapon," improper instructions concerning "remaining unlawfully" in a dwelling, improper instructions concerning complicity, improperly shifting burden of proof, and improper use of prior convictions in sentencing; and failing to properly research and argue the one claim raised on appeal regarding the trial court's improper comment that being cheated in a drug deal does not justify burglary. (Doc. I at 127-51, habeas petition).

assistance of appellate counsel claims set forth in Claim II(a) above were raised and addressed on the merits by the state circuit court and the Alabama Court of Criminal Appeals and, thus, will be addressed here.

17. In reaching its decision to deny Weaver's Rule 32 petition, the state circuit court considered the same claims set forth in Claim II (a) above. (Doc. 11, Ex. 5 at 121-51, Rule 32 petition; Doc. 11, Ex. 5 at 171-73, Order). Finding that Clark's representation on appeal was not ineffective with respect to these claims, the circuit court stated in pertinent part:

> . . . 6. The court finds that appellate counsel did not render ineffective assistance of counsel or make errors prejudicial to the outcome of the petitioner's case.
>
> In order to sued on a claim of ineffective assistance of counsel, the petitioner has the burden to show that "first, . . . counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984). Petitioner has failed to meet the burden to show counsel was

> ineffective under the criteria of *Strickland.* Accordingly, the petition is denied.

(Doc. 11, Ex. 5 at 172-73, Order).

18. Likewise, in its decision affirming the circuit court's denial of Weaver's petition for Rule 32 relief on the basis of ineffective assistance of appellate counsel, the Alabama Court of Criminal Appeals stated in pertinent part:

> [T]he Weavers have failed to show that their appellate counsel were constitutionally ineffective. Robert Clark served as appellate counsel for the Weavers, along with his law partner, Loyd Copeland. . . . Mr. Copeland did not testify at the evidentiary hearing. The Weavers argue that appellate counsel should have raised more than one issue on appeal. Again, suffice it to say that the Weavers failed to produce evidence sufficient to overcome the strong presumption that appellate counsel were constitutionally effective.

(Doc. 11; Ex. 11 at 2-3, Order). The Court of Criminal Appeals concluded, as the state circuit court had, that Weaver had failed to establish that Clark's performance on appeal was constitutionally deficient under *Strickland.* (*Id*).

19. As discussed above, this case is governed by § 2254(d)(1) which requires that a writ may issue only if the state court adjudication resulted in a decision that was contrary to clearly established federal law or involved an unreasonable application of clearly established federal law, as determined by

the United States Supreme Court. *Williams*, 529 U.S. at 412-13; *Bottoson*, 234 F.3d at 531. Having carefully considered all of the claims categorized in Claim II (a) above, the Court finds that Weaver has failed to establish entitlement to relief under this section. The record shows that these issues were addressed on the merits by the state circuit court and the Alabama Court of Criminal Appeals, both of which recognized the applicability of *Strickland* and both of which reasonably applied the principles outlined in *Strickland* to the facts of the case to find that Clark had provided Weaver effective assistance on appeal. (Doc. 11, Ex. 5 at 171-73, Order, Doc. 11, Ex. 11 at 2, Order).

20. This Court agrees that Weaver has failed to meet the *Strickland* standard inasmuch as he has not shown that Clark's representation on appeal fell below "an objective standard of reasonableness" and that a reasonable probability exists that, but for Clark's unprofessional conduct, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 694. While it is true that Clark raised only one issue on appeal, Weaver simply has failed to show that Clark's failure to raise any of the additional issues set forth in Claim II(a) above was unreasonable.

For example, as with Weaver's ineffective assistance of counsel claim arising out Clark's trial performance, Weaver argues that Clark should have raised on appeal the trial court's error in failing to instruct the jury on the definition of "dwelling" as an element of the offense of first degree burglary under *Alabama Code* § 13A-7-5. However, as discussed above, because the definition of dwelling would only have further supported a finding that Weaver was guilty

of first degree burglary, Clark's failure to raise the issue on appeal was not unreasonable. *See* discussion, *supra*, at Claim I.

Similarly, Weaver argues that Clark should have raised on appeal the unconstitutionality of the Habitual Felony Offender Act on the basis of Fourteenth Amendment due process, the Eighth Amendment proscription against cruel and unusual punishment, and the concept of separation of powers. As discussed above, the Alabama courts have consistently rejected constitutional challenges to the Habitual Felony Offender Act on these grounds. *See* discussion, *supra*, at Claim I. Thus, Clark's failure to raise this issue on appeal was not unreasonable.

Having considered each of the issues raised in Claim II (a) above, the Court finds that none supports Weaver's ineffective assistance of counsel claim against Clark. The record reflects that, at the Rule 32 hearing in state court, Clark was never asked why he failed to raise these issues on appeal, nor was his law partner, Loyd Copeland, ever asked what considerations, if any, factored into his decision not to raise these additional issues on appeal, even though it appears that Copeland was the lead appellate counsel. (Doc. 11, Ex 5 at 65, hearing transcript). Because there are legitimate reasons for declining to raise an issue on appeal (lack of merit, limited chance of success, and appeal strategy to name a few), Weaver must show that, in this case, Clark's failure to raise these issues on appeal fell below "an objective standard of reasonableness" and that a reasonable probability exists that, but for Clark's alleged failures, the result would have been different. *Strickland*, 466 U.S. at 688, 694. As noted above, it is not easy to make this required showing, *Van Poyck*, 294 F.3d at 1322, and Weaver again has failed to do so with regard to Claim II (a).

21. In addition, Weaver has not established entitlement to relief under § 2254(d)(2) on the basis of Claim II (a) by showing that the decisions of either the state trial court or the Alabama Court of Criminal Appeals were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. As discussed above, this Court must presume as correct the determinations of all factual issues made by these courts. Weaver simply has not rebutted that presumption of correctness by clear and convincing evidence. Accordingly, Claim II (a) fails for this reason, as well.

22. The Court will now address Weaver's ineffective assistance of appellate counsel claims enumerated in Claims II (b) and (c) above. In his habeas petition, Weaver claims that Clark was ineffective for failing to raise on appeal the issue of insufficiency of the evidence and because of a conflict of interest created by his joint representation of Weaver and his brother, Zonnie. However, Weaver failed to raise either of these issues on direct appeal or in his Rule 32 petition filed in state circuit court.

Generally, "[b]efore a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). This principle, the "exhaustion doctrine," requires that a state prisoner "give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *Id.* Where a petitioner has failed to exhaust his state court remedies, and those remedies are no longer available to him, that failure matures into a procedural default which will bar federal

habeas relief unless either the "cause and prejudice or the fundamental miscarriage of justice exception is established." *Smith v. Jones*, 256 F.3d 1135, 1138-39 (11th Cir. 2001); *see also Bailey v. Nagle*, 172 F.3d 1299, 1305 (11th Cir. 1999) ("[W]e apply the familiar principle that federal courts may treat unexhausted claims as procedurally defaulted, even absent a state court determination to that effect, if it is clear from state law that any future attempts at exhaustion would be futile."); *Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir. 1994) ("Pursuant to the doctrine of procedural default, a state prisoner seeking federal habeas corpus relief, who fails to raise his federal constitution[al] claim in state court, or who attempts to raise it in a manner not permitted by state procedural rules is barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default.").

Alabama law generally requires a criminal defendant to raise a claim of ineffective assistance of counsel in a motion for a new trial in order for that claim to be properly preserved for review upon direct appeal. *Ex parte E.D.*, 777 So. 2d 113, 115 (Ala. 2000) (*citing Ex parte Ingram*, 675 So. 2d 863, 865-66 (Ala. 1996)). However, when a defendant cannot reasonably make such a claim within the 30 days allowed by *Alabama Rule of Criminal Procedure* 24.1(b), the claim may be raised for the first time in a Rule 32 petition. *Id.* In the present case, Weaver could not raise a claim of ineffective assistance of counsel against Clark arising out of his handling of the appeal until after the appeal had concluded. Therefore, Weaver was required to raise any ineffective assistance of counsel claims that he had against Clark in his subsequent Rule 32 petition.

In fact, in his Rule 32 petition, Weaver did assert multiple ineffective assistance of counsel claims against Clark arising out of Clark's handling of the appeal. (Doc. 11, Ex. 5 at 158-61, Rule 32 petition). He simply did not assert the two claims at issue here: that Clark was ineffective on appeal for failing to raise insufficiency of the evidence and because he had a conflict of interest. The Eleventh Circuit has held that a petitioner must raise all of the instances of ineffective assistance of counsel initially in state court before they can be raised in federal court. *Footman v. Singletary*, 978 F.2d 1207, 1209 (11th Cir. 1992) ("a habeas petitioner may not present instances of ineffective assistance of counsel in his federal petition that the state court has not evaluated previously.").

Weaver subsequently included these two claims in his brief to the Alabama Supreme Court seeking certiorari review of the circuit court's denial of his Rule 32 petition. (Doc. 11, Ex. 17 at 40-41, Brief in Support of Petition for Writ of Certiorari). However, Alabama law is clear that "[a]n appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition." *McLin v. State*, 2002 WL 1397514, * 5 (Ala. Crim. App. June 28, 2002) (not yet released for publication) (refusing to consider petitioner's ineffective assistance of counsel claims omitted from his Rule 32 petition and raised for the first time on appeal of the denial of the Rule 32 petition) (citing *Arrington v. State*, 716 So. 2d 237, 239 (Ala. Crim. App. 1997)). Therefore, had the Alabama Supreme Court granted Weaver's petition for certiorari review of the denial of his Rule 32 petition, which it did not, these two issues still would not have been properly before the court

for review since they were not raised in the Rule 32 petition.[11] Moreover, Weaver is now barred from raising these claims in state court in any subsequent Rule 32 petition because the claims were known to exist at the time that his first petition was filed but were not first raised in that petition. *See Alabama Rule of Criminal Procedure* 32.2(b). Therefore, Weaver's ineffective assistance of counsel claims based on Clark's failure to raise insufficiency of the evidence and conflict of interest are procedurally defaulted, and the burden is on Weaver to establish cause and prejudice for the procedural default.

> 23. In procedural default cases, the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. *Murray v. Carrier*, 477 U.S., at 488, 106 S. Ct., at 2645. Objective factors that constitute cause include "'interference by officials'" that makes compliance with the State's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." *Ibid.* In addition, constitutionally

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11. Rule 39(g) of the *Alabama Rules of Appellate Procedure* provides that a writ of certiorari will issue "[i]f the Supreme Court, upon preliminary consideration, concludes that there is a probability of merit in the petition and that the writ should issue." This Court views the Alabama Supreme Court's preliminary consideration of Weaver's petition and denial thereof as merely a procedural determination of lack of "probability of merit" in the petition, not a consideration of the claims on the merits. (Doc. 11, Ex. 23, Order).

> "[i]neffective assistance of counsel . . . is cause." *Ibid.* Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default. *Id.*, at 486-488, 106 S. Ct., at 2644-45. Once the petitioner has established cause, he must show "'actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 168, 102 S. Ct. 1584, 1594, 71 L. Ed. 2d 816 (1982).
>
> Federal courts retain the authority to issue the writ of habeas corpus in a further, narrow class of cases despite a petitioner's failure to show cause for a procedural default. These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice.

McCleskey v. Zant, 499 U.S. 467, 493-94 (1991).

In his habeas petition, Weaver neither alleges nor establishes that any objective factor external to the defense impeded his counsel's efforts to raise Claims II (b) and (c) in state court in his Rule 32 petition, nor does he claim actual prejudice as a result of the default. Therefore, he has failed to establish the cause and prejudice exception with respect to his procedural default of these claims.[12]

12. Even if this Court were to consider Weaver's ineffective assistance of counsel claim based on Clark's purported conflict of (Cont'd)

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24. Notwithstanding his failure to establish the cause and prejudice exception, Weaver has asserted in his petition

(Cont'd)

interest, the claim has no merit. Ineffective assistance of counsel claims in the conflict of interest context are governed by the standard articulated by the Supreme Court in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), which established a two-part test to be used to evaluate whether an attorney is constitutionally ineffective due to a conflict of interest. *See Reynolds v. Chapman*, 253 F.3d 1337, 1342-43 (11th Cir. 2001). "To show ineffectiveness under *Cuyler*, a petitioner must demonstrate: (a) that his defense attorney had as actual conflict of interest, and (b) that this conflict adversely affected the attorney's performance." *Id.* at 1342. To satisfy the "actual conflict" prong, a defendant must show something more than "a possible, speculative, or merely hypothetical conflict." *Id.* at 1342-43. A defendant must "point to specific instances in the record to suggest an actual conflict or impairment of their interests," and he "must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative causes of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remain(s) hypothetical." *Id.* at 1343. (Citations omitted). Then, assuming that a defendant can demonstrate that his attorney labored under an actual conflict of interest, the defendant must show that this conflict adversely affected the representation that he received. "To prove adverse effect, a defendant needs to demonstrate: (a) that the defense attorney could have pursued a plausible alternative strategy, (b) that this alternative strategy was reasonable, and (c) that the alternative strategy was not followed because it conflicted with the attorney's external loyalties." *Id.* (Citations omitted).

In the present case, although Weaver alleges that Clark's joint representation of himself and his brother, Zonnie, on appeal created a conflict of interest, he has completely failed to make the requisite showing under *Cuyler* of an actual conflict of interest that adversely affected Clark's performance. Accordingly, Weaver's claim fails on the merits, as well.

that he is actually innocent of the crime for which he was convicted, burglary in the first degree. A federal court may issue a writ of habeas corpus in extraordinary circumstances in order to avoid a fundamental miscarriage of justice when a constitutional violation has caused the conviction of one who is actually innocent. *McCleskey*, 499 U.S. at 494; *see also Smith v. Murray*, 477 U.S. 527, 537-38 (1986). To establish actual innocence, Weaver must demonstrate that, "'in light of all the evidence,'" "it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327-328 (1995)).

Weaver's innocence argument in this case is based on the alleged insufficiency of the evidence to support his conviction for first degree burglary under *Alabama Code* § 13A-7-5. As discussed above, § 13A-7-5 provides in pertinent part that:

> (a) A person commits the crime of burglary in the first degree if he knowingly and unlawfully enters or remains unlawfully in a dwelling with intent to commit a crime therein, and, if, in effecting entry or while in dwelling or in immediate flight therefrom, he or another participant in the crime:
>
> (1) Is armed with explosives or a deadly weapon; or
>
> (2) Causes physical injury to any person who is not a participant in the crime; or
>
> (3) Uses or threatens the immediate use of a dangerous instrument.

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Notwithstanding Weaver's testimony at the Rule 32 hearing in state court and his arguments in the instant habeas petition that he did not have a knife and never entered the Kellys' trailer on the night in question, the testimony at trial was undisputed that, immediately before the incident at the Kellys' trailer, Weaver put a knife to the throat of Bruce Brooks, the Kellys' neighbor, and threatened to "take [his] fucking head off" if he did not tell Weaver the whereabouts of the deceiving drug dealers. (Doc. 11, Ex. 1 at 244). Then Weaver and his brothers, without permission, entered the trailer where the Kellys lived with their children in order to exact revenge on drug dealers they believed to be inside the trailer. (*Id.* at 121, 145, 156-59, 212, 255). Once in the trailer, Weaver pulled a knife, and he and his brother, Ammon, beat and stabbed Cedric James while his brother, Zonnie, stood by and kept anyone from interfering. (*Id.* at 133-34, 140, 145-46, 161-62). The record fully supports Weaver's conviction for burglary in the first degree, and Weaver has failed to present any new evidence to establish, to the contrary, that he is actually innocent of this crime. The testimony of Weaver and his brother, Zonnie, at their Rule 32 hearing that neither of them entered the Kellys' home falls far short of establishing that a constitutional violation has caused Weaver to be convicted of a crime for which he is actually innocent. *McCleskey*, 499 U.S. at 494.

Accordingly, the Court does not believe that its refusal to consider these defaulted claims carries with it the risk of a manifest miscarriage of justice, and Weaver's petition for habeas relief on the basis of Claims II (b) and (c) should be denied.

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iii. *Claim III*

25. In his habeas petition, Weaver next argues that he is entitled to relief under § 2254 on the basis of insufficiency of the evidence to support his burglary conviction. (Doc. 1 at 151, habeas petition). Like Claims II (b) and (c) above, Weaver failed to raise this issue on direct appeal or in his Rule 32 petition filed in state circuit court, and, as with Claims II (b) and (c), Weaver is now barred from bringing this claim in a subsequent Rule 32 petition in state court. *See Ala. R. Crim. P.* 32.2(a)(5) (barring relief upon any ground which "could have been but was not raised on appeal."); *Ala. R. Crim. P.* 32.2(b) (barring a second or successive petition on any ground that was known at the time that the first petition was heard).

26. As discussed above, where a petitioner has failed to exhaust his state court remedies, and those remedies are no longer available to him, that failure matures into a procedural default which will bar federal habeas relief unless either the "cause and prejudice or the fundamental miscarriage of justice exception is established." *Smith*, 256 F.3d at 1138-39. Weaver has failed to establish either of these exceptions with respect to this claim.

27. Addressing, first, the cause and prejudice exception, it is true that ineffective assistance of counsel is cause for a procedural default, *McCleskey*, 499 U.S. at 494, and it is true that Weaver has alleged in his petition that his appellate counsel, Robert Clark, was ineffective for failing to raise the issue of insufficiency of the evidence on direct appeal. (Doc. 1 at 127, habeas petition). However, before an

ineffective assistance claim can be used to establish cause for a procedural default of another claim, it must first have been presented to the state courts as an independent claim. *Hill v. Jones*, 81 F.3d 1015, 1029 (11th Cir. 1996) (citing *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986)). A procedurally defaulted ineffective assistance of counsel claim cannot serve as cause to excuse a default of a second claim. *Hill*, 81 F.3d at 1030.

This Court found in considering Claim II (b) above that this ineffective assistance of counsel claim was procedurally defaulted; therefore, it cannot provide the basis for cause to excuse Weaver's default of Claim III. Accordingly, the Court need not address the cause and prejudice exception further.

28. Although Weaver has failed to establish the cause and prejudice exception with respect to Claim III, the Court nevertheless would be obligated to consider this claim if Weaver established that a "fundamental miscarriage of justice" had "probably resulted in the conviction of one who is actually innocent." *Smith*, 477 U.S. at 537-38; *McCleskey*, 499 U.S. at 494. However, as the Court found with respect to Claims II (b) and (c) above, Weaver has failed to present any evidence to establish that he is actually innocent of the crime for which he was convicted. Accordingly, the Court does not believe that its refusal to consider this defaulted claim carries with it the risk of a manifest miscarriage of justice, and Weaver's petition for habeas relief on the basis of Claim III should be denied.

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iv. *Claim IV.*

29. In his petition, Weaver finally argues that he is entitled to relief under § 2254 on the basis that prospective application of the May 25, 2000, amendment to the Habitual Felony Offender Act ("HFOA") violates his right to equal protection under the Fourteenth Amendment. (Doc. 1 at 154-56, habeas petition). Respondent answers that Weaver's claim is procedurally defaulted, without merit, and that subsequent legislation eliminating the prospective application requirement of the HFOA amendment has rendered the claim moot. (Doc. 11 at 20-21, Respondent's Answer). For the reasons set forth below, the Court finds that Weaver's petition for habeas relief on the basis of Claim IV is due to be denied.

30. The record in this case reveals that Weaver was sentenced on June 26, 1997, under the pre-amended, mandatory provisions of subsection (c)(3) of the HFOA, *Ala. Code* § 13A-5-9, which required the state trial judge to sentence Weaver to life imprisonment without the possibility of parole because he had been convicted of a Class A felony and had at least three prior non-Class A felony convictions. (Doc. 11, Ex. 5 at 3, Case Action Summary; Doc. 11, Ex. 1 at 367-80, trial transcript). On May 25, 2000, the HFOA was amended by Alabama Act No. 2000-759, to give the trial judge the option of sentencing an offender, like the petitioner, to either life imprisonment *or* life imprisonment without the possibility of parole.

Section 1 of Act No. 2000-759 provides in pertinent part:

> (c) In all cases when it is shown that a criminal defendant has been previously convicted of any

three felonies and after such convictions has committed another felony, he or she must be punished as follows:

(1) On conviction of a Class C felony, he or she must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years.

(2) On conviction of a Class B felony, he or she must be punished by imprisonment for life or any term of not less than 20 years.

(3) On conviction of a Class A felony, where the defendant has no prior convictions for any Class A felony, he or she must be punished **by imprisonment for life *or* life without the possibility of parole, in the discretion of the trial court**.

(4) On conviction of a Class A felony, where the defendant has one or more prior convictions for any Class A felony, he or she must be punished by imprisonment for life without the possibility of parole.

(Emphasis added). In the amendatory act, the Alabama legislature specifically provided that the amendment would be prospective only, applying to those cases in which the sentence was not final in the trial court on May 25, 2000, the effective date of the act. *See Ala.* Act No. 2000-759, § 3. The legislature further stated that the amendment could not

be construed to "create a right of any person currently serving a term of imprisonment imposed pursuant to Section 13A-5-9 . . . prior to the effective date of this amendatory act to petition the parole board or court for review of his or her sentence based on Section 13A-5-9 . . . , as amended." *Id.*

31. The record in this case reveals that, when the May 25, 2000, HFOA amendment went into effect, Weaver's appeal of the denial of his Rule 32 petition was pending before the Alabama Court of Criminal Appeals. (Doc. 11, Ex. 5 at 7). Weaver raised the issue of the unconstitutionality of the prospective application requirement of the May 25, 2000, HFOA amendment to the Court of Criminal Appeals, arguing that the amendment should apply retroactively to him and that, to apply it otherwise, created an arbitrary distinction between persons convicted of the same offense, with identical records of prior conviction, subjecting them to different periods of incarceration depending on the date of their convictions. (Doc. 11, Ex. 8 at 55-56, Appellants' Brief before Alabama Court of Criminal Appeals). Weaver further argued that there was no rational basis for prospective application of the amendment and that the requirement violated his right to equal protection under the Fourteenth Amendment. (*Id.*). On June 22, 2001, the Court of Criminal Appeals affirmed the trial court's denial of Weaver's Rule 32 petition, stating, with regard to this issue, that it could not address the constitutional claim related to the May 25, 2000, HFOA amendment since the claim had not been considered by the trial court.[13] (Doc. 11, Ex. 11 at 2, Order). The court stated:

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13. As Weaver correctly points out, he could not have presented this claim to the state circuit court in his Rule 32 petition because (Cont'd)

> "An appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition." *Arrington v State*, 716 So. 2d 237, 239 (Ala. Crim. App. 1997). Because [petitioner] did not include this claim in [his] petition, it is not properly before this Court for review.

(*Id.*). The Court of Criminal Appeals overruled Weaver's application for rehearing on July 20, 2001. (Doc. 11, Ex. 15, Order). On August 6, 2001, Weaver filed a petition for a writ of certiorari with the Alabama Supreme Court (Doc. 11, Ex. 17 at 4, Brief; Doc. 11, Ex. 18, Order), which that court ultimately denied on March 8, 2002. (Doc. 15, Ex. B, Order). To date, Weaver has not presented this claim to the state circuit court.

32. Weaver now seeks habeas relief on the ground that the prospective application requirement of the May 25, 2000, HFOA amendment is unconstitutional. (Doc. 1 at 154-56, habeas petition). As discussed above, "[i]n general, a federal court may not grant habeas corpus relief to a state prisoner who has not exhausted his available state remedies." *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998) (citing 28 U.S.C. § 2254(b)(1)(A)).[14] "Exhaustion of state remedies requires that

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(Cont'd)

the amendment to the HFOA, on which the claim is based, became effective May 25, 2000, more than two months after the circuit court had denied his Rule 32 petition and while the appeal of that denial was pending in the Court of Criminal Appeals. (Doc. 11, Ex. 5 at 6-7, Case Action Summary; Doc. 11, Ex. 5 at 171-73, Order).

14. 28 U.S.C. § 2254 provides in relevant part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment

(Cont'd)

the state prisoner 'fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights.'" *Snowden*, 135 F.3d at 735. (Citations omitted).

> [I]t is not sufficient merely that the federal habeas applicant has been through the state courts. . . . Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in federal habeas proceeding does it make sense to speak of the exhaustion of state remedies.

Id.

> State courts, like federal courts, are obliged to enforce federal law. Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief. *Rose v. Lundy*, 455 U.S. 509, 515-516, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982); *Darr v. Burford*, 339 U.S. 200, 204, 70 S. Ct. 587, 94 L. Ed. 761 (1950).

O'Sullivan, 526 U.S. at 844. A petitioner "shall not be deemed to have exhausted the remedies available in the courts of the

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(Cont'd)

> of a State court shall not be granted unless it appears that—
>
> > (A) the applicant has exhausted the remedies available in the courts of the State. . . .

State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c).

33. Under *Alabama Rule of Criminal Procedure* 32.1, a defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief on the ground that "(c) [t]he sentence imposed exceeds the maximum authorized by law or is otherwise not authorized by law" Since Weaver claims that the May 25, 2000, HFOA amendment, if applied constitutionally, would require that the state trial court reconsider his sentence taking into account the new option of sentencing him to life imprisonment with the possibility of parole, Rule 32.1(c) arguably would be an appropriate vehicle by which to assert that claim. Moreover, although Rule 32.2(b) precludes "successive" petitions on the same or similar grounds raised in a previous petition, the Alabama courts have held that a petition raising the same ground previously raised in an earlier petition is not "successive" unless the ground was considered on the merits in the previous petition. *See Whitt v. State*, 2001 WL 996849, *5 (Ala. Crim. App. August 31, 2001) (in order for a claim that has been raised in a previous Rule 32 petition to be precluded as successive under Rule 32.2(b), "the claim must have been decided on the merits in the previous petition."). Although Weaver raised this claim before the Court of Criminal Appeals in his previous Rule 32 proceedings, the court refused to consider it; therefore, the claim would not be precluded as "successive."

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34. As discussed above, the AEDPA codified the requirement that an applicant for a writ of habeas corpus must first exhaust his claims in state court before presenting them to federal court. *See* 28 U.S.C. § 2254(b). Under this requirement, a mixed petition, such as that involved here containing both exhausted and unexhausted claims, ordinarily must be dismissed without prejudice, "allowing either resubmission of only exhausted claims or total exhaustion."[15] *Snowden*, 135 F.3d at 736.

However, where "unusual" or "exceptional" circumstances exist, such as where it is "perfectly clear that the applicant does not raise even a colorable federal claim," a mixed petition that includes unexhausted claims may be considered by a federal court. *See Granberry v. Greer*, 481 U.S. 129, 134-35 (1987) (noting that, in such circumstances, the interests of all concerned are better served if the court does not require exhaustion and proceeds to deny the habeas petition). This policy is directly incorporated into § 2254(b)(2) of the AEDPA, which provides:

> An application for a writ of habeas corpus may be *denied* on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(Emphasis added). *See also Lafitte v. Johnson*, 2000 WL, 724159, *2 n.2 (S.D. Ala. May 17, 2000) ("under 28 U.S.C. § 2254(b)(2), the Court may deny the habeas petition on the merits even if petitioner has failed to exhaust state

15. Unlike Claims II (b) and (c) and Claim III above, which also were unexhausted, Weaver still has a remedy in state court with respect to this claim. Therefore, it is not procedurally barred.

remedies."); *Gaylor v. Harrelson*, 962 F. Supp. 1498, 1501 (N.D. Ga. 1997) ("[d]enial of a petition pursuant to § 2254(b)(2) is appropriate when it is 'perfectly clear' that the petition fails to present 'even a colorable claim.'").

On June 14, 2002, the Alabama Supreme Court answered the precise legal question raised by Weaver here and found that prospective application of the May 25, 2000, HFOA amendment did not violate the equal protection clause of the Fourteenth Amendment. *See Ex parte Zimmerman*, 2002 WL 1302899 (Ala. June 14, 2002) (not yet released for publication). Given this decision, the Court is convinced that Weaver does not raise even a colorable federal claim and that further resort to state remedies would be futile.[16]

In *Zimmerman,* the petitioner, like Weaver, had been sentenced under the pre-amended § 13A-5-9(c)(3), and, like Weaver, Zimmerman argued that his 1991 sentence of life imprisonment without the possibility of parole as a habitual felony offender violated his right to equal protection given the May 25, 2000, amendment to § 13A-5-9(c)(3). Zimmerman argued that the amendment impermissibly treated Class A felony offenders, with three prior non-Class A felony convictions, differently based on whether the offender's sentence was final in the trial court on May 25, 2000. Zimmerman, 2002 WL 1302899, *1.

The court described Zimmerman's equal protection argument as follows:

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16. The Eleventh Circuit has also recognized that futility of exhaustion is an exception to the exhaustion requirement. *See Allen v. State of Alabama*, 728 F.2d 1384, 1387 (11th Cir. 1984).

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> [Zimmerman] contends that the prospective application of the amended sentencing statute violates his right to equal protection under the laws by creating a date-based classification that confers the possibility of more lenient sentencing on a class of persons whose sentences were not final as of May 25, 2000, the effective date of the Act, while arbitrarily and inequitably excluding from the possibility of that leniency those persons, like him, whose sentences for offenses of the same nature or seriousness were final before the effective date of the Act.

Zimmerman, 2002 WL 1302899, *2. Quoting the opinion of the Court of Criminal Appeals in the case, the Alabama Supreme Court rejected Zimmerman's argument, stating:

> "Under the well-recognized rule, Zimmerman's argument has no merit. '[A] reduction of sentences only prospectively from the date a new sentencing statute takes effect is not a denial of equal protection.' 16B C.J.S. Constitutional Law § 777 (1985). *See also* Arthur W. Campbell, *Law of Sentencing* § 8:6 (2d ed. 1991) ('It has been ruled equal-protection principles [do not] require retroactive application of a newly enacted statute which would lessen sentencing sanctions. . . .'). *See, e.g., Mirenda v. Vlibarri*, 351 F. Supp. 676 (C.D. Cal. 1972); *In re Moreno*, 58 Cal. App. 3d 740, 743, 130 Cal. Rptr. 78, 80 (1976) ('Equal protection is not denied where an amendatory statute reducing a penalty is not applied to persons

whose convictions were final before the effective date of the ameliorative amendment.'); *Carter v. State*, 512 N.E.2d 158, 170 (Ind. 1987) ('Because Carter was charged, tried, and sentenced before the amendment went into effect, it was not a denial of equal protection to sentence Carter according to the statute in effect at that time.'); *Bowen v. Recorder's Court Judge*, 384 Mich. 55, 179 N.W.2d 377 (1970); *Burch v. Tennessee Dep't of Correction*, 994 S.W.2d 137 (Tenn. Ct. App. 1999). Where legislation confers a benefit not previously provided and is effective on a certain date, the apparent inequity results from all such ameliorative legislation and has been held not to deny equal protection. *Jackson v. Alabama*, 530 F.2d 1231, 1238 (5th Cir. 1976). *See also Brooks v. State*, 622 So. 2d 447, 449 (Ala. Crim. App. 1993) ('A prisoner sentenced under an earlier, less favorable sentence reduction statute generally has no right to complain of the ameliorative provisions of a later good-time statute.').

. . .

'This is of necessity the result of any new law which is to go into effect at and on a certain date. The seeming inequity in fixing a cut-off date is outbalanced by the factors of reliance and burden on the administration of justice which argue for prospective application only. *Stovall v. Denno*, 388 U.S. 293, 300-301, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 . . . (1967).' *See also Jackson v. Alabama,*

530 F.2d at 1238 ('the "factors of reliance and burden on the administration of justice," *Stovall v. Denno* [, 388 U.S. 293, 300, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967)], outweigh the apparent inequity in determining a fixed cutoff date'); . . . *People v. Grant*, 71 Ill. 2d 551, 562, 17 Ill. Dec. 814, 377 N.E.2d 4, 9 (1978) (avoiding remand for additional sentencing hearings is a reasonable basis for the Legislature's distinguishing between those defendants who had not yet been sentenced prior to the effective date of the amendatory act and those, on the other hand, whose sentences had been imposed before the effective date); *Burch v. Tennessee Dep't of Correction*, 994 S.W.2d at 139 (the preservation of the deterrent effect that arises from allowing sentences that have already been imposed to remain unchanged is a legitimate state interest); *State ex rel. Stewart v. McWherter*, 857 S.W.2d 875, 877 (Term. Crim. App. 1992) (a compelling state interest exists in preserving the finality of criminal litigation resulting in a conviction and sentence which were valid at the time of their imposition).

. . .

Some courts have resolved the issue of the effect of an amendatory act by statutory construction. . . . [Citations omitted]. We see no constitutional question involved in this case. The fact that the legislature reduces the penalty for a crime after a prisoner is sentenced, and he does not benefit from

> that mitigation of punishment, does not constitute an arbitrary classification or deny the prisoner equal protection of the law. . . . *Bradley v. United States*, 410 U.S. 605, 93 S. Ct. 1151, 35 L. Ed. 2d 528 . . . (1973)'"

Zimmerman, 2002 WL 1302899, *2-4. The Alabama Supreme Court concluded:

> "'Equal protection is not denied where an amendatory statute reducing a penalty is not applied to persons whose convictions were final before the effective date of the ameliorative amendment (*Jones v. Cupp* (9th Cir. 1971) 452 F.2d 1091.) The only requirement is that 'classifications between those to whom the state accords and withholds substantial benefits must be reasonably related to a legitimate public purpose.' [Citations omitted]."
>
> The disparity of which Zimmerman complains does not run between classes of persons whose situations are indistinguishable. Zimmerman was sentenced under § 13A-5-9(c)(3) and his sentence became final before the May 25, 2000, amendment became effective. He is being treated similarly to all other offenders sentenced under the law in effect at the time he was sentenced. More importantly, the State has a legitimate interest in seeking to ameliorate the perceived harshness of the Habitual Felony Offender Act and a strong concomitant interest in maintaining the finality

> of judgments and "'assur[ing] that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.'" [Citations omitted]. The prospective application of a sentencing statute -- which may result in the punishment of offenders based upon the date of final judgment — is reasonably related to these legitimate State interests and does not violate an offender's right to equal protection. The judgment of the Court of Criminal Appeals is affirmed.

Zimmerman, 2002 WL 1302899, *4-5.

Given the Alabama Supreme Court's sound rejection of the precise claim made by Weaver in this case, no reasonable possibility exists that Weaver could obtain relief from the state court on the basis that the prospective application requirement of the May 25, 2000, HFOA amendment violates the equal protection clause of the Fourteenth Amendment. As such, it would serve no purpose to require further exhaustion of this claim in state court.

35. Therefore, considering Weaver's claim on the merits, this Court agrees with the Alabama Supreme Court in *Zimmerman*, and the cases cited therein, that prospective application of the May 25, 2000, amendment to the HFOA does not violate the equal protection clause of the Fourteenth Amendment. *See, e.g., Unified States v. Sorondo*, 845 F.2d 945, 948 (11th Cir. 1988) (rejecting appellant's constitutional arguments, including an equal protection challenge, that Congress could not enact a provision which mitigated the

effect of a prior sentencing provision unless the new law was given retroactive effect, stating: "Congress is certainly empowered to pass laws which lessen the severity of previous sentencing provisions, and it need not do so retroactively."). Because this claim is without merit, it does not warrant habeas relief. Therefore, Weaver's petition for a writ of habeas corpus on the basis of Claim IV should be denied.[17]

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17. Respondent also argues in his answer that the Alabama legislature subsequently eliminated the prospective application requirement of the May 25, 2000, HFOA amendment, thereby rendering Claim IV of Weaver's petition moot. Respondent refers to Act No. 2001-977, which became effective August 28, 2001, and provides:

> The provisions of Section 13A-5-9 of the Code of Alabama 1975, shall be applied *retroactively* by the sentencing judge or presiding judge for consideration of early parole of each non-violent convicted offender based on evaluations performed by the Department of Corrections and approved by the Board of Pardons and Paroles and submitted to the court.

(Emphasis added). Assuming that Act No. 2001-977 eliminates the prospective application requirement of the May 25, 2000, HFOA amendment as to some convicted felony offenders, it is far from clear whether the act requires the state circuit court to apply the May 25, 2000, HFOA amendment retroactively to Weaver, thereby rendering Claim IV moot. In any event, because the Court bias otherwise determined that Weaver is not entitled to habeas relief on the basis of Claim IV, it need not address this argument.

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CONCLUSION

Based on the foregoing, the undersigned Magistrate Judge is of the opinion that the petitioner's rights were not violated and that his request for habeas corpus relief should be denied.

The attached sheet contains important information regarding objections to the report and recommendation of the Magistrate Judge.

DONE this the 20th day of August, 2002.

s/ William E. Cassady
WILLIAM E. CASSADY
UNITED STATES MAGISTRATE JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION FOR RECONSIDERATION DATED AND FILED FEBRUARY 5, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15708-G

MARK WEAVER,

Petitioner-Appellant,

versus

MICHAEL HALEY,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

Before ANDERSON and BLACK, Circuit Judges

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated December 18, 2002, denying his motion for a certificate of appealability. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because he has failed to make the requisite showing. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000).